TETUAN KAMARUDIN & PARTNERS v. CHEW SWEE YOKE & OTHER APPEALS

COURT OF APPEAL, PUTRA JAYA
KAMARDIN HASHIM JCA
CHE MOHD RUZIMA GHAZALI JCA
NORDIN HASSAN JCA
[CIVIL APPEALS NO: W-02(A)-1500-08-2019,
W-02(A)-1501-08-2019 & W-02(A)-1502-08-2019]
8 DECEMBER 2020

LEGAL PROFESSION: *Bill of costs – Taxation – Application for bill of costs to be taxed – Whether proceeding in court of law – Whether action founded on contract envisaged under s. 6(1)(a) of Limitation Act 1953 – Whether application ought to be made within six years from date course of action accrued – Whether there was undue delay – Whether time-barred*

LIMITATION: *Cause of action – Accrual of – Application for bill of costs to be taxed – Whether proceeding in court of law – Whether action founded on contract envisaged under s. 6(1)(a) of Limitation Act 1953 – Whether application ought to be made within six years from date course of action accrued – Whether there was undue delay – Whether time-barred*

There were three appeals filed by the appellant against the decisions of the High Court in relation to three bills of costs which were taxed by the Deputy Registrar pertaining to the following matters (i) divorce petition ('petition 954'); judicial separation petition ('petition 837'); and (iii) divorce petition ('petition 1588'). The respondent was engaged as senior counsel for the appellant's client in the above-mentioned matrimonial proceedings and the appellant was the instructing solicitor to the respondent. The respondent's appointment as senior counsel for the appellant's client ceased in September 2007 after the High Court granted custody of the children to the appellant's client. Thereafter, the respondent sent her gross sum bill dated 8 October 2007 in the sum of RM550,165.36 to the appellant. As the respondent had not received any response or payment from the appellant, the respondent then filed an application to tax the respondent's bills of costs for work done in the High Court, the Court of Appeal and the Federal Court under s. 126(1) of the Legal Profession Act 1976. The application was granted by the High Court and an order for taxation was issued on 22 March 2010. The respondent then filed the bills of costs at the Court of Appeal. The appellant filed notices of motion seeking the Court of Appeal's determination on the issue whether a High Court could order a higher court to tax costs of an appeal proceeded at the Court of Appeal or whether leave to tax costs ought to be applied for and granted by the court at which the appeal was proceeded

with *ie,* the Court of Appeal. The notices of motion were dismissed by the Court of Appeal, and an order was made that the High Court order dated 22 March 2010 must be adhered to and the respondent's fees for the proceedings in the High Court, Court of Appeal and the Federal Court were to be taxed in the High Court. Eventually, on 25 July 2016, the respondent filed the three bills of costs for taxation in the High Court and the matter was heard before the Deputy Registrar. At the outset of the hearing, the appellant raised a preliminary objection that the three bills of costs which were filed for taxation were time-barred under the Limitation Act 1953 but no full submissions were made before the Deputy Registrar. On 6 January 2017, the Deputy Registrar allowed the total costs of RM150,000 for the respondent in handling all the three matrimonial proceedings for the appellant's client. Dissatisfied, the appellant filed an appeal to the High Court where the appellant raised the same preliminary objection that the bills of costs filed for taxation by the respondent were time-barred as they were filed after a six-year period which was in contravention of s. 6(1) of the Limitation Act 1953 ('the Act'). However, the appellant's preliminary objection was dismissed by the Judicial Commissioner who was of the view that, by filing the bills of costs at the Court of Appeal on 21 March 2013, the respondent had taken the first step to commence the taxation proceeding and it was done within the limitation period. Therefore, the High Court allowed a total costs for the respondent with regard to the three matrimonial proceedings in the sum of RM254,000. Hence, these appeals. The core issue that arose was whether the respondent's application at the High Court, filed on 25 July 2016, for the three bills of costs to be taxed were time-barred pursuant to s. 6(1)(a) of the Act.

Held (allowing appeal)
Per Nordin Hassan JCA delivering the judgment of the court:

(1) The respondent had agreed to represent the appellant's client in the matrimonial proceedings as evident, *inter alia,* by the letter dated 3 October 2000. This created a contract between the appellant and the respondent in which the respondent provided the legal service in consideration of the fees to be paid by the appellant to the respondent. In the circumstances, there was a contractual solicitor-client relationship between the appellant and the respondent. (paras 13 & 14)

(2) The word 'action' has been defined under s. 2 of the Act to include a suit or any other proceedings in a court of law. Clearly, the respondent's application for her bills of costs to be taxed filed in court was a proceeding in a court of law. As such, it was an action founded on a contract envisaged under s. 6(1)(a) of the Act. Therefore, the respondent's application must be made within six years from the date

the cause of action accrued. The cause of action accrued on the date the High Court granted the order for taxation which was on 22 March 2010 and the time period expired on 21 March 2016. However, the respondent's application for the three bills of costs to be taxed were filed only on 25 July 2016 with the delay of four months. Therefore, the respondent's contention that the limitation period was 12 years under s. 6(3) of the Act was devoid of merit. (paras 15 & 17)

(3) The provision of s. 6(1) is plain and unambiguous that the expiration of six years was from the date on which the cause of action accrued and as alluded to earlier, the cause of action in this case accrued on 22 March 2010. As the wordings of s. 6(1) is unambiguous and clear, it must be given their natural and ordinary meaning. In the circumstances, the period of limitation began on 22 March 2010 based on the order granted by the High Court, irrespective of the fact that the respondent had filed her bills of costs at the Court of Appeal on 21 March 2013. (paras 18 & 19)

(4) The law provides that the limitation period for filing an application for bill of costs to be taxed is six years and it runs from the date the cause of action accrued. Hence, the date of filing the application for the respondent's bills of costs to be taxed at the Court of Appeal clearly was not the date the cause of action accrued. The limitation period pursuant to s. 6(1)(a) of the Act must be complied with although the respondent had filed for her bills of costs to be taxed at the Court of Appeal. The application to tax the respondent's bills of costs were filed at the High Court after six years and four months from the date the High Court granted the order for taxation. This was clearly beyond the six years limitation period under s. 6(1)(a) of the Act and, as such, was time-barred. (paras 21 & 22)

Case(s) referred to:

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***

Guannex Leasing Sdn Bhd v. Sin Fatt Brothers Construction & Ors [2002] 6 CLJ 433 HC ***(refd)***

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***

Machinchang Skyways Sdn Bhd & Anor v. Lembaga Pembangunan Langkawi & Anor And Another Appeal [2015] 3 CLJ 775 CA ***(refd)***

Punithavathi Ponniah v. Ganendra Torquil Ponnusamy Ganendra & Anor [2014] 8 CLJ 735 CA ***(refd)***

Syarikat Hing Lee Fishing (Sabah) Sdn Bhd v. Lin Yun Thai & Ors [2019] 1 LNS 289 CA ***(refd)***

United Malayan Banking Corporation Bhd v. PTL Marketing Services Sdn Bhd & Ors [2004] 2 CLJ 152 HC ***(refd)***

A **Legislation referred to:**
Legal Profession Act 1976, s. 126(1)
Limitation Act 1953, ss. 2, 6(1)(a), (3)

For the appellant - Walter Pereira, Izyan Darlina Balia Yusof & Rameswaran; M/s Kamarudin & Partners
B *For the respondent - Chew Swee Yoke; M/s Douglas Yee*

[Editor's note: For the High Court judgment, please see Ananda Dharmalingam v. Chantella Honeybee Sargon [2019] 1 LNS 1871 (overruled).]

Reported by Suhainah Wahiduddin

C **JUDGMENT**

Nordin Hassan JCA:

Introduction

[1] There are three appeals filed by the appellant against the decisions of
D the High Court in relation to three bills of costs which were taxed by the Deputy Registrar. The appeals are Civil Appeals No. WA-02(A)-1500-08-2019, WA-02(A)-1501-08-2019 and WA-02(A)-1502-08-2019. The said bills of costs pertain to the following matters:

(i) Divorce Petition No. S8-33-954-2006 ("Petition 954");

E (ii) Judicial Separation Petition No. S8-33-837-2000 ("Petition 837"); and

(iii) Divorce Petition No. 33-1588-2005 ("Petition 1588")

The Salient Facts

F **[2]** The material facts in the present appeals are the following:

(i) On 3 October 2000, the respondent was engaged as senior counsel for the appellant's client in the abovementioned matrimonial proceedings and the appellant were the instructing solicitors to the respondent. The appellant's client was an Australian woman named Chantella Honeybee
G Sargon and her husband is a Malaysian named Ananda Dharmalingam. They have two children out of the marriage.

(ii) The respondent's appointment as senior counsel for the appellant's client ceased in September 2007 after the High Court had granted custody of the children to the appellant's client.

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(iii) Thereafter, the respondent sent her gross sum bill dated 8 October 2007 in the sum of RM550,165.36 to the appellant. As the respondent had not received any respond or payment from the appellant, the respondent then filed an application to tax the respondent's bills of costs for work done in the High Court, the Court of Appeal and the Federal Court

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under sub-s. 126(1) of the Legal Profession Act 1976. The application was granted by the High Court and an order for taxation was issued on 22 March 2010. The order by High Court Kuala Lumpur among others, states:

> ... ADALAH DIPERINTAHKAN Pempetisyen dibenarkan mencukaikan kosnya terhadap kesemua Responden-Responden tersebut di atas seperti di antara peguamcara dan pelanggan di dalam pelbagai prosiding-prosiding di dalam Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan tersebut di atas dalam suatu jumlah yang melebihi, jika perlu, jumlah yang dinyatakan di dalam Bil Kasar bertarikh 8 haribulan Oktober 2007 DAN AKHIRNYA ADALAH DIPERINTAHKAN kos permohonan ini dicukaikan dan dibayar oleh responden-responden kepada Pempetisyen.

(iv) The appellant then filed an appeal against the order of the High Court but on 31 May 2012 the appeal was withdrawn. Next, on 21 March 2013 the respondent filed the bills of costs at the Court of Appeal but the matter was brought before the Deputy Registrar where the appellant raised several preliminary objections which were, whether the High Court can direct the Court of Appeal to have the bills of costs taxed in the Court of Appeal, whether the Court of Appeal is bound by the High Court order, whether the High Court order is valid in law and whether the High Court has the jurisdiction to make the said order or leave of the Court of Appeal should be obtained.

(v) In this regard, the Deputy Registrar ruled that the preliminary objections should be decided by the Court of Appeal which resulted the appellant filing notices of motion on 13 November 2013 seeking the Court of Appeal's determination on the issue whether a High Court can order a higher court to tax costs of an appeal proceeded at the Court of Appeal or whether leave to tax costs ought to be applied for and granted by the court at which the appeal was proceeded with ie, the Court of Appeal.

(vi) Further, on 10 December 2013, the notices of motion were dismissed by the Court of Appeal and made an order that the High Court order dated 22 March 2010 must be adhered to and the respondent's fees for the proceedings in High Court, Court of Appeal and the Federal Court are to be taxed in the High Court. The order of the Court of Appeal among others states:

> (b) Perintah bertarikh 22 Mac 2010 dalam Mahkamah Tinggi Petisyen No. R4(R2)-17-9-2008 mestilah dipatuhi dan fi peguam yang perlu dibayar oleh Taxing Party mengenai pelbagai prosiding-prosiding di dalam Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan perlu dicukaikan di Mahkamah Tinggi.

(vii) Eventually, on 25 July 2016, the respondent filed the three bills of costs for taxation in the High Court and the matter was heard before the Deputy Registrar. At the outset of the hearing, the appellant raised a preliminary objection that the three bills of costs which were filed for taxation on 25 July 2016 were time-barred under the Limitation Act 1953 but no full submissions were made before the Deputy Registrar. On 6 January 2017, the Deputy Registrar allowed the total costs of RM150,000 for the respondent in handling all the three matrimonial proceedings for the appellant's client. However, the issue of limitation time period was not canvassed in the Deputy Registrar's grounds of judgment. Dissatisfied with the decision of the Deputy Registrar, the appellant filed an appeal to the High Court in Kuala Lumpur.

Finding Of The High Court

[3] At the High Court, the appellant raised the same preliminary objection that the bills of costs filed for taxation by the respondent were time-barred as they were filed after six years period which is in contravention of s. 6(1) of the Limitation Act 1953.

[4] However, the appellant's preliminary objection was dismissed by the Judicial Commissioner who was of the view that by filing the bills of costs at the Court of Appeal on 21 March 2013, the respondent had taken the first step to commence the taxation proceeding and it was done within the limitation period. At para. 41 of the Judicial Commissioner's grounds of judgment, she said this:

> **In my view, by filing the Bills of Costs at the COA on 21.3.2013, Ms Chew had taken the first step to commence the taxation proceeding and this was done within the limitation period.** The fact that Ms Chew did not filed the Bills of Costs at the HC and the Federal Court at or around the same time is immaterial as she had until 21.3.2016 to do so, on the basis of her understanding of the said HC Order at that point of time. With the said COA Orders, the procedure as to the filing of the Bills of Costs was made clear and Ms Chew subsequent filing of the Bills of Costs at the HC on 25.7.2016 cannot be said to be time-barred.
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> (emphasis added)

[5] Thereafter, the High Court allowed a total costs for the respondent with regard to the three matrimonial proceedings in the sum of RM254,000.

The Appeal

[6] The core issue in the present appeals is relatively straightforward that is whether the respondent's application at the High Court, filed on 25 July 2016, for the three bills of costs to be taxed were time-barred pursuant to s. 6(1)(a) of the Limitation Act 1953 ("the Act").

[7] As this main issue will determine the outcome of the appeals, both parties in the present case agreed to submit only on this issue of limitation period for the determination of this court.

[8] In essence, the appellant contended that the respondent's application for the three bills of costs to be taxed were time-barred as they were filed six years and four months from the date the order for taxation was granted by the High Court which was on 22 March 2010. This, the appellant submitted, was in contravention of s. 6(1)(a) of the Act which provides for such application to be filed within the period of six years. The appellant further submitted that the filing of the bills of costs by the respondent at the Court of Appeal does not stop the limitation period from running.

[9] Conversely, the respondent submitted that her application for the bills of costs to be taxed were filed within time pursuant to sub-s. 6(3) of the Act which allows an action for any judgment to be brought within the period of 12 years.

Our Deliberation And Decision

[10] It is a trite principle of law that a defence of limitation is a complete defence. This has been decided by plethora of authorities including the decision of this court in *Syarikat Hing Lee Fishing (Sabah) Sdn Bhd v. Lin Yun Thai & Ors* [2019] 1 LNS 289 where it was held as follows:

> … Limitation, if proved, is a complete defence to the counterclaim. And, as we shall soon see, the appellant's defence of limitation is of merit and ought to have been so considered by the learned Judge. We are of the firm view that the counterclaim ought to have been dismissed on the sole ground of limitation and the appellant's claim thereby, allowed. This is how the limitation argument ought to have been addressed.

[11] This doctrine of limitation as a complete defence is also based on the considerations that there is a presumption that a right not exercised for a long time is non-existent and that it is necessary that matters of right in general should not be too long in a state of uncertainty. (see *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 (SC))

[12] Reverting to the present case, the first issue for consideration of this court is whether the limitation period for the respondent to file the application for the bills of costs to be taxed is within six years pursuant to sub-s. 6(1)(a) or 12 years as provided under sub-s. 6(3) of the Act. For ease of reference, the relevant provisions are as follows:

Section (6)

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of **six years from the date on which cause of action accrued**, that is to say:

a) actions founded on a contract or on tort; …

(2) …

(3) An action upon any judgment shall not be brought after the expiration of **twelve years from the date on which the judgment became enforceable** and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(emphasis added)

[13] Coming back to the instant case, the respondent had agreed to represent the appellant's client in the matrimonial proceedings as evident *inter alia* by the letter dated 3 October 2000. This created a contract between the appellant and the respondent in which the respondent provides the legal service in consideration of the fees to be paid by the appellant to the respondent. The relationship between the applicant and the respondent is considered as a solicitor and client's relationship. This is also clearly stated in the order of High Court dated 22 March 2010 in the following words:

ADALAH **DIPERINTAHKAN** pempetisyen dibenarkan mencukaikan kosnya terhadap kesemua Responden-Responden tersebut di atas **seperti di antara peguamcara dan pelanggan …**

(emphasis added)

[14] In the circumstances, there was a contractual solicitor and client's relationship between the appellant and the respondent. On this issue, the Federal Court in the case of *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719 held as follows:

[43] Once a solicitor-client relationship exists and thus a retainer, it 'put into operation the normal terms of the contractual relationship including in particular the duty' of the solicitor 'to protect the interests' of his client 'in matters to which the retainer relates by all proper means'.

[15] Next, the word "action" has been defined under s. 2 of the Act to include a suit or any other proceedings in a court of law. Clearly, the respondent's application for her bills of costs to be taxed filed in court was a proceeding in a court of law. As such, it was an action founded on a contract envisaged under s. 6(1)(a) of the Act. Therefore, the respondent's application must be made within six years from the date the cause of action accrued. In the present case, the cause of action accrued on the date the High Court granted the order for taxation which was on 22 March 2010 and the time period expired on 21 March 2016. However, the respondent's application for the three bills of costs to be taxed were filed only on 25 July 2016 with the delay of four months.

[16] The same issue on limitation period under s. 6 of the Act had also been dealt with by this court in *Punithavathi Ponniah v. Ganendra Torquil Ponnusamy Ganendra & Anor* [2014] 8 CLJ 735 where it was held as follows:

> [22] Turning to the question of limitation, ss. 6(1)(a) and (b) of the Limitation Act 1953 speak of "actions founded on a contract" and "actions to enforce an award". Section 2 of the same Act defines the word "action" to include "a suit or any other proceedings in a court of law". **While an application to tax a bill of costs is not a suit, it can certainly be described as a proceeding in a court.**
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> [23] But even if it can be argued that the application for taxation is a proceeding founded on a contract or is a proceeding to enforce an award, **the court still has to consider whether the application was made "after the expiration of six years from the date on which the cause of action accrued".**
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> [24] The respondents contended that the consent order became enforceable on the date it was made i.e., 25 August 2004 or the date that order was reinstated by the Court of Appeal i.e., on 22 September 2005 and therefore the six years began to run from either of these dates.
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> [25] We do not agree. **What we are concerned with here is not so much the question of enforceability of an order of court, but with the date on which a cause of action accrues.** In *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69, Hashim Yeop Sani CJ (Malaya) speaking for the then Supreme Court held at p. 76:
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> > As stated earlier a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all facts have happened which are material to be proved to entitle the plaintiff to succeed.
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> (emphasis added)

(See also *Guannex Leasing Sdn Bhd v. Sin Fatt Brothers Construction & Ors* [2002] 6 CLJ 433; and *United Malayan Banking Corporation Bhd v. PTL Marketing Services Sdn Bhd & Ors* [2004] 2 CLJ 152; [2004] 1 MLRH 10).

[17] Having considered the facts and the relevant laws, we find the respondent's contention that the limitation period of 12 years under sub-s. 6(3) of the Act was applicable in the present case is devoid of any merit.

[18] Further, we find that the Judicial Commissioner did acknowledged that the final date for the respondent to file the bills of costs was on the 21 March 2016 but was of the view that by filing the bills of costs at the Court of Appeal on 21 March 2013, the respondent had taken the first step to commence the taxation proceeding and was done within the limitation period. This was where the Judicial Commissioner fell into error. The provision of sub-s. 6(1) is plain and unambiguous that the expiration of six

A years is from the date on which the cause of action accrued and as alluded to earlier the cause of action in this case accrued on the 22 March 2010. As the wordings of sub-s. 6(1) is unambiguous and clear, it must be given their natural and ordinary meanings. This is trite principle of law as explained by high authorities including the Federal Court case of *Dr Koay Cheng Boon v.* B *Majlis Perubatan Malaysia* [2012] 4 CLJ 445; [2012] 3 MLJ 173 in the following words:

> [48] A statute is the written will of the Legislature. It is the fundamental rule of interpretation of a statute that should be expounded according to the intent of Parliament. Courts must use the literal rule where a clear C meaning of a statute will allow it, ie, interpret the statute literally, according to its ordinary plain meaning. In the event of the words of the statute being precise and unambiguous in themselves, it is only just necessary to expound those words in their natural and ordinary sense.

[19] In the circumstances, the period of limitation in this case begun on D 22 March 2010 based on the order granted by the High Court, irrespective of the fact that the respondent had filed her bills of costs at the Court of Appeal on 21 March 2013. In fact, the Court of Appeal had also made an order for the parties to adhere to the order of the High Court.

[20] On the same issue, it is instructive to make reference to the decision E of this court in *Machinchang Skyways Sdn Bhd & Anor v. Lembaga Pembangunan Langkawi & Anor And Another Appeal* [2015] 3 CLJ 775 where the court stated this:

> [25] In our view, the defendants were at liberty to file the said applications. In *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ F 663, Nik Hashim FCJ said:
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> > 23. Regarding the issue of limitation of time, the Court of Appeal appears to interpret it as barring a remedy but not the right to sue. That is not correct. In so far as PAPA is concerned, the law is settled. The Privy Council in *Yew Boon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 held that limitation G under PAPA is "just as much a "right" as any other statutory or contractual protection against a future suit".
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> > **24. In this respect, both the Court of Appeal and the Federal Court have consistently struck out claims when it was clear that the statute of limitations would be relied on or raised.**
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> [30] in our view, the learned Judicial Commissioner had not erred in refusing to admit the said letter. In any event, we found that there is nothing in the said letter to suggest that the defendants had agreed to the re-filing of a fresh suit outside the limitation period. **It is reasonable** I **to expect the plaintiffs to comply with the requirement of the law on limitation in the event they decided to file a fresh suit.**
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> (emphasis added)

[21] Likewise in the instant case, the law provides that the limitation period for filing an application for bill of costs to be taxed is six years and it runs from the date the cause of action accrued. Hence, the date of filing the application for the respondent's bills of costs to be taxed at the Court of Appeal clearly was not the date the cause of action accrued. The limitation period pursuant to sub-s. 6(1)(a) must be complied with although the respondent had filed for her bills of costs to be taxed at the Court of Appeal.

[22] Reverting to the present case, the application to tax the respondent's bills of costs were filed at the High Court after six years and four months from the date the High Court granted the order for taxation. This is clearly beyond the six years limitation period under sub-s. 6(1)(a) of the Act and as such is time-barred.

Conclusion

[23] Based on the aforesaid reasons, we find there is appealable error in the present case that warrants the intervention of this court. Hence, the appellant's appeal is allowed and the High Court decision is set aside. No order as to costs.